

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-5831

ARNOLD EUGENE WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, ARNOLD EUGENE WILLIAMS, respectfully prays
that a writ of certiorari issue to review the judgment and opinion
of the United States Court of Appeals for the Fifth Circuit,
entered October 30, 1975.

OPINION BELOW

The Court of Appeals entered its opinion on October 30, 1975.
A copy of the opinion affirming the judgment of conviction is
attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether waiting sixteen months to hold a hearing on whether to revoke probation, though Petitioner was available to be tried, constituted a denial to Petitioner of his statutory and constitutional right to a speedy trial warranting dismissal of the motion to revoke probation.

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. 18 U.S.C. §3653 states, in part: "As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

II. The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

STATEMENT OF THE CASE

On June 18, 1973, Petitioner was convicted for the offense of Unlawful Possession With the Intent to Distribute a Quantity of Robitussin Cough Syrup, in violation of 21 U.S.C. §841(a)(1), in the United States District Court for the Southern District of Texas, Laredo Division. He was sentenced to a thirty-six month sentence, thirty-three months of which was suspended with a special parole term of two years. A Motion to Revoke Probation was filed on January 21, 1974 (during the term of the probation). On February 5, 1974, an order for the issuance of a probation warrant was filed and entered. The Motion to Revoke Probation alleged that Petitioner violated the terms of his probation by leaving the Western District of Texas without permission and by committing three offenses of robbery in Houston, Texas.

It was not until April 25, 1975, that a hearing on the Motion to Revoke Probation was held in the United States District Court for the Southern District of Texas, Laredo Division. On April 30, 1975, the District Court entered a Memorandum and Order setting aside the suspension of the thirty-three months remaining of the original sentence and ordering the sentence into execution.

Petitioner had been arrested and placed in state custody on December 27, 1973, and remained in custody until the hearing date sixteen months later. The Motion to Revoke Probation in federal court was filed within a month of the arrest date, but the District Court did not hold a hearing immediately because of the desire to await the outcome of the state charges. One of the three state robbery charges was dismissed soon after Petitioner's arrest; Petitioner was acquitted on another of the charges; and he was convicted of the third robbery on March 28, 1974. He placed his state conviction on appeal, and the appeal was still pending a year later when the District Court held the hearing on the Motion to Revoke Probation.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This was a motion instituted by the Government seeking to revoke probation granted Petitioner following his conviction under 21 U.S.C. §841(a)(1).

REASONS FOR GRANTING THE WRIT

Petitioner contends that the Court of Appeals for the Fifth Circuit has decided an important question of federal law which should be settled by this Court.

The Court of Appeals for the Fifth Circuit summarily overruled Petitioner's contention that the delay of sixteen months from date of arrest to date of hearing was unreasonable. The Court held that the probation was revoked within the probationary period and the delay was not unreasonable "under the circumstances." The "circumstances" apparently pertained to the fact that the District Court was awaiting the outcome of the state robbery cases, but there was a delay of over one year after the state

conviction, and the status of the state case did not change in the intervening period. The appeal from the state case was still pending at the time of the federal hearing.

Applying the criteria set forth in Barker v. Wingo, 407 U.S. 514 (1972), Petitioner was denied his right to a speedy disposition of the Motion to Revoke Probation. 1) Length of delay: Sixteen months of continuous custody is not "as speedily as possible after arrest" under the dictate of 18 U.S.C. §3653. 2) Reason for delay: There was no need to await the outcome of the state proceedings, and, at any rate, the District Court failed to await the final outcome of the state proceedings. 3) Assertion of speedy trial right: Petitioner filed a Motion to Dismiss prior to the federal hearing, contending he was denied his right to a speedy trial, and this Motion was filed three weeks from the date that Petitioner was appointed counsel in the federal case. 4) Prejudice caused by the delay: Prejudice is obvious if witnesses die or disappear, and it was proved at the hearing that two material fact witnesses for the Petitioner became unavailable during the sixteen-month period of delay (one died and one disappeared).

Petitioner demonstrated substantial prejudice in the failure of the District Court to grant him a speedy hearing, and in light of the policies which underline the right to a speedy trial, dismissal is the only possible remedy. Strunk v. United States, 412 U.S. 434 (1973).

CONCLUSION

For the reasons stated, the Supreme Court should reverse the conviction of the Petitioner and direct that the Motion to Revoke Probation be dismissed.

Respectfully submitted,

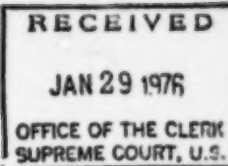
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MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that he was denied the right to a speedy trial in violation of the Sixth Amendment by the delay between the filing of a motion to revoke his probation and the probation revocation hearing.

On June 18, 1973, petitioner was convicted in the United States District Court for the Southern District of Texas of possessing a controlled substance (robitussin) with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, three months of which were to be served in confinement, and the balance suspended in favor of probation. He was also sentenced to two years' special parole.

Upon completing his term of imprisonment, petitioner was placed under the supervision of the probation service of the

United States District Court for the Western District of Texas (Tr. 145-146). On December 27, 1973, petitioner was arrested by state police in Houston, Texas (within the Southern District of Texas) and was charged with three armed robberies (Tr. 146-147).

On January 21, 1974, a motion to revoke petitioner's probation was filed in the United States District Court for the Southern District of Texas, to which supervision of petitioner's probation had been transferred after his arrest. On February 5, 1974, that court issued a warrant for petitioner's arrest for violation of the terms of his probation. Execution of the warrant was delayed pending resolution of the state criminal proceedings.^{1/}

Petitioner was acquitted on one of the state armed robbery charges, and another charge was dismissed; however, on March 28, 1974, petitioner was convicted on the third armed robbery count. On March 12, 1975, after petitioner became entitled to be released from state custody, the probation violator's warrant was executed, and on the following day a preliminary hearing was held on the motion to revoke probation. On April 16, 1975, petitioner filed a motion to dismiss, contending that he had been denied the right to a speedy revocation

^{1/} Memorandum and Order at 1, attached hereto as Appendix A.

hearing. The district court denied relief, and the probation revocation hearing was held on April 25, 1975, approximately 15 months after the filing of the motion.

Petitioner contends that this delay violated his Sixth Amendment right to a speedy trial. But parole and probation revocation proceedings are not "criminal" cases, and the Sixth Amendment, by its terms, is inapplicable. See Gagnon v. Scarpelli, 411 U.S. 778, 781; Morrissey v. Brewer, 408 U.S. 471, 480. Petitioner therefore is entitled to relief only if the delay deprived him of his Fifth Amendment right to due process of law.

The Due Process Clause applies only when an individual is deprived of "liberty" or "property." In this case petitioner was not deprived of his liberty by the United States until the warrant was executed on March 12, 1975. A preliminary hearing followed immediately, and the final revocation hearing took place on April 25, well within the outer limits set by the Due Process Clause. Petitioner has not demonstrated any prejudice caused by the delay; revocation of his probation was supported by his state conviction (which cannot be relitigated in the probation revocation proceedings) and by the undisputed fact that he left the Western District of Texas without permission.

We acknowledge, however, that this case appears to present as to probation revocation the same constitutional issues that are presented as to parole revocation by Moody v. Daggett, No. 74-6632, Gaddy v. Michael, No. 75-5215, and Orr v. Levi, No. 75-5594, in which petitions for writs of certiorari are

presently pending. We have acquiesced in the granting of those petitions so that this Court may resolve the conflict among the circuits regarding the manner in which parole may be revoked when the parolee has been convicted of a crime committed while on parole and the proper remedy when parole has not been revoked with sufficient dispatch.^{2/} If those petitions are denied, then the instant petition ought also to be denied since it raises no different constitutional issues. If those petitions are granted, however, then we suggest that this case should be held and disposed of in accordance with those decisions.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

^{2/} We are serving a copy of our responses in those cases upon counsel for petitioner. The office of Legislative Affairs informs us that it expects that during March, 1976 the Conference Committee will report on the legislation referred to therein.

APPENDIX

April 30, 1975

MEMORANDUM AND ORDER:

On Motion to Revoke Probation

The above named defendant was convicted in this court in June, 1973, of the possession with the intent to distribute a large quantity of Robitussin, a controlled substance. He was sentenced to three years confinement, three months of which was to be served, the remaining 33 months to be probated with supervision. After serving his three months, defendant took residence in San Antonio, Texas (within the Western District) where he had previously resided and was under supervision of the Probation Service of that court.

On December 27, 1973, the defendant was arrested in Houston, Texas by State officers; and in due course thereafter was indicted in three cases of armed robbery.

Thereafter defendant's probationary supervision was returned to this District and motion to revoke the probation was filed. As the defendant was in custody and unable to post bond in the three State proceedings, the revocation hearing was delayed to await the outcome of the State charges. Recently, however, following conviction in one of the State cases, petitioner has taken an appeal, and has posted bond and thus would be entitled to release from custody save for the probation violator's warrant issued by this court. Thus I have felt it advisable to set for hearing the motion to revoke. Such hearing was held April 25, 1975. In effect, this was simply a retrial of the State court conviction.

Defendant was arrested by Houston, Texas, police on December 27, 1973, while riding with one Rosalie Bell

in an automobile owned by her. This vehicle had been identified by witnesses as one used by the robber in escaping following the robbery of a "Jack-in-the-Box" about 8:45 p.m. on December 21, 1973. By reason of his relation with the owner of the vehicle, defendant was viewed in a series of line-ups by a number of victims of other recent robberies.

He was identified and later charged as the armed robber of the Dutch Mill Cleaners, which robbery took place about 8:10 a.m. on December 19, 1973; with the robbery of the Jack-in-the-Box on December 21, 1973; and with being one of the several armed men who robbed the executive offices of the Lucky Seven Stores about 3:30 p.m. December 26, 1975[sic].

The defendant was brought to trial for the Dutch Mill Cleaners robbery. This resulted in an acquittal. There was a single employee-witness within the establishment which was victimized; and while her identification was positive and clear, business records showed the defendant was employed in San Antonio at the time of the robbery.

With respect to the Jack-in-the-Box offense, this charge was dismissed at a preliminary hearing. This is understandable in that the only witness who undertook to identify the defendant was a then fourteen year old employee whose identification was tenuous and uncertain at best.

With respect to the Lucky Seven robbery of December 26, however, the story is quite different. The defendant was identified by three witnesses who had abundant opportunity to observe him, and to listen to him speak during the course of the robbery. Of particular significance is the testimony of one of the witnesses to the

effect that one of the robbers (whom she identified as the defendant) had no teeth. Such is the case with the defendant, as became evident when he took the stand in his own defense at the recent hearing. It was this charge in the State court which resulted in conviction.

It appears, however, that while the defendant gave notice of appeal, he has done nothing to perfect the appeal, the transcript has not been prepared, and the status of the matter is uncertain.

From the evidence adduced on the revocation hearing, I adopt the view of the jury in the State court proceeding. I find the defendant has violated his probation (a) in participating in the robbery of December 26, 1973, and (b) in leaving the Western District of Texas without permission of his probation officer.

The suspension of the 33 months remaining of the original sentence is set aside and the sentence ordered into execution.

The clerk will file this Memorandum and Order and furnish copies to counsel of record.

Done at Houston, Texas, this 30th day of April, 1975.

/s/ BEN C. CONNALLY
Ben C. Connally
Senior United States
District Judge

Williams testified in his own behalf at the revocation hearing. He denied his guilt of the offenses which underlay the revocation proceedings.

The United States District Court revoked the probation, and this appeal followed.